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12 *ATTORNEYS FOR PLAINTIFF*
13 *LARRY G. PHILPOT*

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 LARRY G. PHILPOT,

17 Plaintiffs,

18 v.
19

20 METABRAINZ FOUNDATION, INC.
21

22 Defendant.
23

CASE NO. 2:18-cv-6620

**COMPLAINT FOR
COPYRIGHT
INFRINGEMENT,
VIOLATIONS OF THE
DIGITAL MILLENNIUM
COPYRIGHT ACT**

JURY TRIAL DEMANDED

1 Larry G. Philpot ("Mr. Philpot" or "Plaintiff") complains against defendant
2 MetaBrainz Foundation, Inc. ("MetaBrainz" or "Defendant") as follows:

3 1. Mr. Philpot is a professional photographer who has taken many well-known
4 and sought-after photographs of musicians live in concert. Defendant MetaBrainz has
5 used numerous of Mr. Philpot's photographs, without Mr. Philpot's permission and
6 with the photographs' metadata and copyright management information stripped. As
7 such, MetaBrainz is liable to Mr. Philpot for damages for copyright infringement and
8 violations of the Digital Millennium Copyright Act.

9 **JURISDICTION AND VENUE**

10 2. This civil action arises under the United States Copyright Act, 17 U.S.C. § 101
11 *et seq*, and under the Digital Millennium Copyright Act, 17 U.S.C. § 1202 *et seq*. This
12 Court has jurisdiction over this action under 28 U.S.C. § 1331, 17 U.S.C. § 501(a), 17
13 U.S.C. § 1202, and 28 U.S.C. § 1338.

14 3. This Court has personal jurisdiction over MetaBrainz by virtue of the fact that
15 it transacts and does business in this District and is incorporated in the state of
16 California. Upon information and belief, MetaBrainz maintains a business location
17 in San Luis Obispo, California. A substantial part of the relevant events alleged in
18 this Complaint occurred in this District.

19 4. Venue is also proper in this District pursuant to 28 U.S.C. §§ 1391(b) and
20 1400(a) because MetaBrainz transacts, does business, and maintains a business
21 location in this District, because its website targets residents in this District, and
22 because a substantial part of the events or omissions giving rise to the claims occurred
23 in this District.

24 **PARTIES**

25 5. Mr. Philpot is a professional photographer whose work focuses exclusively on
26 concert events across the United States. Mr. Philpot resides in Indianapolis, Indiana.
27 Mr. Philpot's photographs of leading concert performers are known for their high
28 quality and acuity.

1 6. Defendant MetaBrainz is a California domestic nonprofit with its principal
2 place of business at 3565 South Higuera Street, Suite B, San Luis Obispo, CA 93401.

3 7. MetaBrainz operates a website at www.musicbrainz.org that purports to be an
4 “open music encyclopedia that collects music metadata and makes it available to the
5 public.” According to its website, MusicBrainz.org is maintained by a global
6 community of users and encourages users to participate by posting content on its
7 website. MusicBrains.org also states that it aims to “allow[] anyone to contribute and
8 release[] the data under open licenses.”

9 **FACTS COMMON TO ALL COUNTS**

10 8. On October 4, 2009, Mr. Philpot took a photograph of entertainer John
11 Mellencamp in performance at Farm Aid 2009 in Saint Louis, Missouri (the
12 “Mellencamp Photograph”). The photograph is an original work that is copyrighted
13 under United States law and was registered with the United States Copyright Office
14 on May 14, 2013 with the Certificate Number VAu 1-164-648. Plaintiff’s
15 registration is attached hereto as **Exhibit A**.

16 9. Mr. Philpot has been and is the sole owner of the copyright. The Mellencamp
17 Photograph was first uploaded to the Wikimedia website by Mr. Philpot on or about
18 October 5, 2013. A true and correct copy of the Mellencamp Photograph is attached
19 hereto as **Exhibit B**.

20 10. On August 2, 2013, Mr. Philpot took a photograph of entertainer Chris
21 Daughtry in performance in Indianapolis, Indiana (the “Daughtry Photograph”). The
22 photograph is an original work that is copyrighted under United States law with the
23 United States Copyright Office on August 15, 2013, with the Certificate Number VAu
24 1-164-624. Plaintiff’s registration is attached hereto as **Exhibit C**.

25 11. Mr. Philpot has been and is the sole owner of the Daughtry Photograph. The
26 Daughtry Photograph was first uploaded to the Wikimedia website by Mr. Philpot on
27 or about September 12, 2013. A true and correct copy of the Daughtry Photograph is
28 attached hereto as **Exhibit D**.

1 12. On April 20, 2011, Mr. Philpot took a photograph of entertainer Devon Allman
2 in performance in Memphis, Tennessee (the “Allman Photograph”). The photograph
3 is an original work that is copyrighted under United States law and was registered
4 with the United States Copyright Office on May 14, 2013 with the Certificate Number
5 VAu 1-164-648. Plaintiff’s registration is attached hereto as **Exhibit A**.

6 13. Mr. Philpot has been and is the sole owner of the Allman Photograph. The
7 Allman Photograph was first uploaded to the Wikimedia website by Mr. Philpot on
8 or about October 4, 2013. A true and correct copy of the Allman Photograph is
9 attached hereto as **Exhibit E**.

10 14. On October 2, 2010, Mr. Philpot took a photograph of entertainer Jeff Tweedy
11 in performance at Farm Aid 2010 in Milwaukee, Wisconsin (the “Tweedy
12 Photograph”). The photograph is an original work that is copyrighted under United
13 States law and was registered with the United States Copyright Office on May 14,
14 2013 with the Certificate Number VAu 1-164-648. Plaintiff’s registration is attached
15 hereto as **Exhibit A**.

16 15. Mr. Philpot has been and is the sole owner of the Tweedy Photograph. The
17 Tweedy Photograph was first uploaded to the Wikimedia website by Mr. Philpot on
18 or about October 4, 2013. A true and correct copy of the Tweedy Photograph is
19 attached hereto as **Exhibit F**.

20 16. On July 6, 2013, Mr. Philpot took a photograph of entertainer Kelly Hansen in
21 performance in Milwaukee, Wisconsin (the “Hansen Photograph”). The photograph
22 is an original work that is copyrighted under United States law with the United States
23 Copyright Office on August 15, 2013, with the Certificate Number VAu 1-164-624.
24 Plaintiff’s registration is attached hereto as **Exhibit C**.

25 17. Mr. Philpot has been and is the sole owner of the Hansen Photograph. The
26 Hansen Photograph was first uploaded to the Wikimedia website by Mr. Philpot on
27 or about September 12, 2013. A true and correct copy of the Hansen Photograph is
28 attached hereto as **Exhibit G**.

1 18. On July 31, 2013, Mr. Philpot took a photograph of entertainer Ted Nugent in
2 performance in Indianapolis, Indiana (the “Nugent Photograph”). The photograph is
3 an original work that is copyrighted under United States law with the United States
4 Copyright Office on August 15, 2013, with the Certificate Number VAu 1-164-624.
5 Plaintiff’s registration is attached hereto as **Exhibit C**.

6 19. Mr. Philpot has been and is the sole owner of the Nugent Photograph. The
7 Nugent Photograph was first uploaded to the Wikimedia website by Mr. Philpot on
8 or about September 12, 2013. A true and correct copy of the Nugent Photograph is
9 attached hereto as **Exhibit H**.

10 20. On June 28, 2013, Mr. Philpot took a photograph of entertainer Tom Petty in
11 performance in Milwaukee, Wisconsin (the “Petty Photograph”). The photograph is
12 an original work that is copyrighted under United States law with the United States
13 Copyright Office on August 15, 2013, with the Certificate Number VAu 1-164-624.
14 Plaintiff’s registration is attached hereto as **Exhibit C**.

15 21. Mr. Philpot has been and is the sole owner of the Petty Photograph. The Petty
16 Photograph was first uploaded to the Wikimedia website by Mr. Philpot on or about
17 September 12, 2013. A true and correct copy of the Petty Photograph is attached
18 hereto as **Exhibit I**.

19 22. On August 20, 2011, Mr. Philpot took a photograph of entertainer Buddy Guy
20 in performance in Albany, Indiana (the “Guy Photograph”). The photograph is an
21 original work that is copyrighted under United States law and was registered with the
22 United States Copyright Office on May 14, 2013 with the Certificate Number VAu
23 1-164-648. Plaintiff’s registration is attached hereto as **Exhibit A**.

24 23. Mr. Philpot has been and is the sole owner of the Guy Photograph. The Guy
25 Photograph was first uploaded to the Wikimedia website by Mr. Philpot on or about
26 October 5, 2013. A true and correct copy of the Guy Photograph is attached hereto
27 as **Exhibit J**.

28

1 24. On October 4, 2009, Mr. Philpot took a photograph of entertainer Lukas Nelson
2 in performance at Farm Aid 2009 in Saint Louis, Missouri (the “Lukas Nelson
3 Photograph”). The photograph is an original work that is copyrighted under United
4 States law and was registered with the United States Copyright Office September 5,
5 2012 with the Certificate Number VAu 1-132-411. Plaintiff’s registration is attached
6 hereto as **Exhibit K**.

7 25. Mr. Philpot has been and is the sole owner of the Lukas Nelson Photograph.
8 The Lukas Nelson Photograph was first uploaded to the Wikimedia website by Mr.
9 Philpot on or about October 4, 2013. A true and correct copy of the Lukas Nelson
10 Photograph is attached hereto as **Exhibit L**.

11 26. On October 4, 2009, Mr. Philpot took a photograph of entertainer Willie Nelson
12 in performance at Farm Aid 2009 in Saint Louis, Missouri (the “Willie Nelson
13 Photograph”). The photograph is an original work that is copyrighted under United
14 States law and was registered with the United States Copyright Office September 5,
15 2012 with the Certificate Number VAu 1-132-411. Plaintiff’s registration is attached
16 hereto as **Exhibit K**.

17 27. Mr. Philpot has been and is the sole owner of the Willie Nelson Photograph.
18 The Willie Nelson Photograph was first uploaded to the Wikimedia website by Mr.
19 Philpot on or about June 15, 2011. A true and correct copy of the Willie Nelson
20 Photograph is attached hereto as **Exhibit M**.

21 28. Mr. Philpot has made the Mellencamp, Daughtry, Allman, Tweedy, Hansen,
22 Nugent, Petty, Guy, and Lukas Nelson Photographs available through the website
23 Wikimedia for reproduction, distribution, public display, public performance, and
24 public digital performance of the photograph and derivative works, solely under and
25 pursuant to the terms of the Creative Commons Attribution-ShareAlike 3.0 Unported
26 license (the “CC 3.0 License”). The terms of the CC 3.0 License require the licensee
27 to give appropriate credit, provide a link to the license, and indicate if changes were
28 made. Only when these terms are met may a licensee copy and redistribute the

1 material in any medium or format and/or remix, transform, and build upon the
2 material for any purpose, even commercially. This license requires that the
3 photographs be attributed to Mr. Philpot. A screenshot of the license and attribution
4 requirements taken on July 31, 2018, is attached hereto as **Exhibit N**.

5 29. Mr. Philpot has made Willie Nelson Photograph available through the website
6 Wikimedia for reproduction, distribution, public display, public performance, and
7 public digital performance of the photograph and derivative works, solely under and
8 pursuant to the terms of the Creative Commons Attribution 2.0 Generic License (the
9 “CC 2.0 License”). The terms of the CC 2.0 License require the licensee to give
10 appropriate credit, provide a link to the license, and indicate if changes were made.
11 Only when these terms are met may a licensee copy and redistribute the material in
12 any medium or format. This license requires that the photographs be attributed to Mr.
13 Philpot. A screenshot of the license and attribution requirements taken on July 31,
14 2018, is attached hereto as **Exhibit Z**.

15 30. The Mellencamp, Daughtry, Allman, Tweedy, Hansen, Nugent, Petty, Guy,
16 Lukas Nelson, and Willie Nelson Photographs are collectively referred to herein as
17 the “Subject Photographs.”

18 31. Mr. Philpot also licenses some small versions of the Subject Photographs
19 through his personal website, available at <http://www.soundstagephotography.com/>,
20 with the requirement that attribution be given to Mr. Philpot.

21 32. On both the Wikimedia website and Mr. Philpot’s personal website, the Subject
22 Photographs contain copyright management information (CMI), including metadata,
23 which indicate that Mr. Philpot is the author of the Subject Photographs, that the
24 Subject Photographs must be attributed to Mr. Philpot, and that the Subject
25 Photographs are copyrighted by Mr. Philpot.

26 33. MetaBrainz has reproduced, publicly displayed, and publicly distributed the
27 Subject Photographs on its www.musicbrainz.org website without authorization or
28 proper attribution as required under the terms of the applicable license(s).

1 34. Metabrainz's reproduction, public display, and public distribution of the
2 Mellencamp Photograph is still available online and can be found at the following
3 URL: <https://musicbrainz.org/artist/0aad6b52-fd93-4ea4-9c5d-1f66e1bc9f0a>. The
4 publication of the Mellencamp Photograph on this website was first discovered by
5 Mr. Philpot within the three years prior to the filing of this complaint. A screen shot
6 of this website is attached hereto as **Exhibit O**.

7 35. Metabrainz's reproduction, public display, and public distribution of the
8 Daughtry Photograph is still available online and can be found at the following URL:
9 <https://musicbrainz.org/artist/db377c15-8bec-4b59-ae37-e971d79d019c>. The
10 publication of the Daughtry Photograph on this website was first discovered by Mr.
11 Philpot within the three years prior to the filing of this complaint. A screen shot of
12 this website is attached hereto as **Exhibit P**.

13 36. Metabrainz's reproduction, public display, and public distribution of the
14 Allman Photograph is still available online and can be found at the following URL:
15 <https://musicbrainz.org/artist/67976cde-e6c4-477f-9e99-949f69e3cb3b>. The
16 publication of the Allman Photograph on this website was first discovered by Mr.
17 Philpot within the three years prior to the filing of this complaint. A screen shot of
18 this website is attached hereto as **Exhibit Q**.

19 37. Metabrainz's reproduction, public display, and public distribution of the
20 Tweedy Photograph is still available online and can be found at the following URL:
21 <https://musicbrainz.org/artist/63287966-6021-474a-ba76-edc37a5f1b7c>. The
22 publication of the Tweedy Photograph on this website was first discovered by Mr.
23 Philpot within the three years prior to the filing of this complaint. A screen shot of
24 this website is attached hereto as **Exhibit R**.

25 38. Metabrainz's reproduction, public display, and public distribution of the
26 Hansen Photograph is still available online and can be found at the following URL:
27 <https://musicbrainz.org/artist/3b123ee0-deae-40a2-8d00-b76567dabe4f>. The
28 publication of the Hansen Photograph on this website was first discovered by Mr.

1 Philpot within the three years prior to the filing of this complaint. A screen shot of
2 this website is attached hereto as **Exhibit S**.

3 39. Metabrainz's reproduction, public display, and public distribution of the
4 Nugent Photograph is still available online and can be found at the following URL:
5 <https://musicbrainz.org/artist/e491fae8-3a5a-438e-8368-925753fb41a1>. The
6 publication of the Nugent Photograph on this website was first discovered by Mr.
7 Philpot within the three years prior to the filing of this complaint. A screen shot of
8 this website is attached hereto as **Exhibit T**.

9 40. Metabrainz's reproduction, public display, and public distribution of the Petty
10 Photograph is still available online and can be found at the following URL:
11 <https://musicbrainz.org/artist/5ca3f318-d028-4151-ac73-78e2b2d6cdcc>. The
12 publication of the Petty Photograph on this website was first discovered by Mr.
13 Philpot within the three years prior to the filing of this complaint. A screen shot of
14 this website is attached hereto as **Exhibit U**.

15 41. Metabrainz's reproduction, public display, and public distribution of the Guy
16 Photograph is still available online and can be found at the following URL:
17 <https://musicbrainz.org/artist/4336a134-d091-4e54-9967-c7c433db6d4e>. The
18 publication of the Guy Photograph on this website was first discovered by Mr. Philpot
19 within the three years prior to the filing of this complaint. A screen shot of this
20 website is attached hereto as **Exhibit V**.

21 42. Metabrainz's reproduction, public display, and public distribution of the Lukas
22 Nelson Photograph is still available online and can be found at the following URL:
23 <https://musicbrainz.org/artist/3e3dae82-05b5-41ff-97c9-d69648a16a80>. The
24 publication of the Lukas Nelson Photograph on this website was first discovered by
25 Mr. Philpot within the three years prior to the filing of this complaint. A screen shot
26 of this website is attached hereto as **Exhibit W**.

27 43. Metabrainz's reproduction, public display, and public distribution of the Willie
28 Nelson Photograph is still available online and can be found at the following URL:

1 <https://musicbrainz.org/artist/668fd73c-bf54-4310-a139-305517f05311>. The
2 publication of the Willie Nelson Photograph on this website was first discovered by
3 Mr. Philpot within the three years prior to the filing of this complaint. A screen shot
4 of this website is attached hereto as **Exhibit X**.

5 44. Despite having no permission, consent, or license to do so, MetaBrainz has, for
6 commercial gain and purpose, reproduced, distributed, and publicly displayed the
7 Subject Photographs. MetaBrainz has also made available, specifically for
8 advertising, third party's distribution, display and public and sharing the Subject
9 Photographs with the DMCA Copyright management information and metadata
10 stripped from all versions of the photos. MetaBrainz instead displayed Plaintiff's
11 copyrighted photos, stripped of the DMCA Copyright management information and
12 metadata with improper attribution to "Wikimedia Commons."

13 45. On September 18, 2017, Mr. Philpot, through counsel, sent a cease and desist
14 letter to MetaBrainz at its San Luis Obispo, California address. The letter informed
15 MetaBrainz of its infringement of the Mellencamp Photograph and asked MetaBrainz
16 to either remove the photograph, or to give Mr. Philpot proper attribution as required
17 by law. To date, MetaBrainz has not responded to the letter, and has not removed the
18 Mellencamp Photograph from its website. A copy of the cease and desist letter is
19 attached hereto as **Exhibit Y**.

20 **FIRST CLAIM FOR RELIEF**

21 **Copyright Infringement, 17 U.S.C. § 501**

22 46. Plaintiff, Philpot incorporates herein by reference the allegations in paragraphs
23 1 - 45, above.

24 47. Plaintiff is the owner of all rights, title, and interest in the copyrights to the
25 Subject Photographs, which consist of material wholly original and which are
26 copyrighted subject matter under the laws of the United States. Plaintiff has complied
27 in all respects with the Copyright Act and all the laws of the United States governing
28 copyrights. The Subject Photographs have been timely registered with the United

1 States Copyright Office, including for purposes of Plaintiff's recovery of attorneys'
2 fees and statutory damages.

3 48. Defendant has directly infringed Plaintiff's copyrights by reproducing,
4 displaying, distributing and utilizing Plaintiff's Subject Photographs for purposes of
5 trade in violation of 17 U.S.C. § 501 et seq., without properly attributing the
6 photographs to Plaintiff and, on information and belief, removing and/or altering the
7 photographs' identifying metadata and copyright management information and/or
8 having knowledge of its removal and/or alteration.

9 49. On information and belief, Defendant has willfully infringed Plaintiff's
10 copyrights by altering the Subject Photographs, by using the Subject Photographs on
11 its website without properly attributing the Subject Photographs to Plaintiff, after
12 removing and/or altering the photographs' identifying metadata and copyright
13 management information and/or having knowledge of its removal and/or alteration,
14 by misattributing Plaintiff's copyright to "Wikimedia Commons," and by failing to
15 remove or attribute the Mellencamp Photograph after receiving Mr. Philpot's cease
16 and desist letter.

17 50. As a result of Defendant's acts of copyright infringement, Plaintiff has suffered
18 substantial damages in an amount to be established at trial.

19 51. As a result of Defendant's acts of copyright infringement as alleged herein,
20 Defendant has obtained direct and indirect profits it would not otherwise have realized
21 but for its infringements. As such, Plaintiff is entitled to disgorgement of Defendant's
22 profits directly and indirectly attributable to Defendant's infringements of the Subject
23 Photographs, in an amount to be established at trial.

24 52. Plaintiff is informed and believes and thereon alleges that Defendant has
25 committed the acts of infringement alleged herein with actual knowledge or reckless
26 conduct, thus acting in disregard to Plaintiff's rights such that Plaintiff is entitled to a
27 finding of willful infringement and enhanced damages.

28

SECOND CLAIM FOR RELIEF

For Violations of the Digital Millennium

Copyright Act, 17 U.S.C. §§ 1202 and 1203

53. Plaintiff Philpot incorporates here by reference the allegations in paragraphs 1 - 52 above.

54. Plaintiff is informed and believes and thereon alleges that Defendant violated 17 U.S.C. §1202 et seq. by intentionally removing or altering the Subject Photographs' identifying metadata and copyright management information without the authority of Plaintiff or the law, and/or by distributing the photograph with the identifying metadata and copyright management information removed and/or altered, knowing the same had been removed or altered without the authority of Plaintiff or the law, knowing or having reasonable grounds to know that such actions would induce, enable, facilitate, or conceal an infringement of Plaintiff's rights.

55. Specifically, Plaintiff is informed and believes, and thereon alleges, that Defendant took the Subject Photographs from Wikimedia and/or other online locations which included metadata identifying Plaintiff as the photographer and owner, and without the authority of Plaintiff or the law, removed and/or altered that rights management information, and/or that Defendant took the Subject Photographs knowing that the copyright management information had been removed and/or altered without the authority of Plaintiff or the law, and used the photographs on its website knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of Plaintiff's rights. and in addition by failing to remove or attribute the Mellencamp Photograph after receiving Mr. Philpot's cease and desist letter

56. Plaintiff is informed and believes and thereon alleges that Defendant further violated 17 U.S.C. §1202 et seq. by knowingly and with the intent to induce, enable, facilitate, or conceal infringement, providing copyright management information that

1 is false and distributing copyright management information that is false, by failing to
2 attribute the photographs to Plaintiff.

3 57. The above conduct is in violation of the Digital Millennium Copyright Act and
4 exposes Defendant to additional and enhanced common law and statutory damages
5 and penalties, including in the form of Plaintiff's costs and attorneys' fees.

6 58. Plaintiff is informed and believes and thereon alleges that Defendant's conduct
7 as alleged herein was willful, reckless, and/or with knowledge, and that Defendant
8 acted knowing, or, with respect to civil remedies under section 1203, having
9 reasonable grounds to know, that its actions would induce, enable, facilitate, or
10 conceal an infringement of any right under this title, and that Defendant also acted
11 knowingly and with the intent to induce, enable, facilitate, or conceal infringement,
12 so that Plaintiff is entitled to seek enhanced damages and penalties.

13 59. As a result of Defendant's actions, Plaintiff has suffered substantial damages
14 in an amount to be established at trial.

15 60. As a result of Defendant's actions, Defendant has obtained direct and indirect
16 profits it would not otherwise have realized. Plaintiff is entitled to disgorgement of
17 Defendant's profits, in an amount to be established at trial.

18
19 **PRAYER FOR RELIEF**

20 **WHEREFORE**, Plaintiff requests judgment against Defendant as follows:

- 21 a. That Defendant and its respective agents and employees and those acting
22 in concert with them be enjoined from infringing Plaintiff's copyrights
23 in any manner, specifically those for the Subject Photographs;
24 b. That Plaintiff be awarded all profits of Defendant plus all losses of
25 Plaintiff, plus any other monetary advantage gained by the Defendant
26 through its infringement, the exact sum to be proven at the time of trial,
27 or, if elected before final judgment, statutory damages under the
28 Copyright Act, 17 U.S.C. § 101 et seq.;

- 1 c. That Plaintiff be awarded damages for Defendant's violations of 17
2 U.S.C. § 1202, including all available damages under 17 U.S.C. § 1203;
3 d. That Plaintiff be awarded its attorneys' fees as available under the
4 Copyright Act 17 U.S.C. § 101 et seq.;
- 5 a. That Plaintiff be awarded pre-judgment interest as allowed by law;
6 b. That Plaintiff be awarded the costs of this action; and
7 c. That Plaintiff be awarded such further legal and equitable relief as the
8 Court deems proper.

9
10 **DEMAND FOR JURY TRIAL**

11 Plaintiff Larry Philpot hereby demands trial by jury of all issues so triable under
12 the law.

13
14 Respectfully submitted,

15
16 Dated: August 1, 2018

17 By: /s/ Michael N. Zachary
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